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No. 1175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

LOCAL NO. 7, INTERNATIONAL UNION OF JOURNEYMEN HORSESHOERS OF THE UNITED STATES AND CANADA, (AFL-CIO), ET AL.,

Petitioners,

v.

A. IRWIN TAYLOR, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-26a) is reported at 353 F. 2d 593. The opinion of the District Court (Pet. App. 27a-41a) is reported at 222 F. Supp. 812.

JURISDICTION

The judgment of the court below was entered on November 5, 1965. On January 14, 1966, an order was entered by Chief Justice Warren extending the time for filing a

petition for a writ of certiorari to April 3, 1966.[1] The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals and the district court correctly concluded that the boycotting and price-fixing activities engaged in by the local and international unions herein, and their members, would be exempt from the antitrust laws if, and only if, (1) the trainers and the horseshoers stand in the relationship of employer and employee and dispute some aspect of that relationship, or (2) the employer-employee relationship of others is the crux of the dispute between the trainers and the horseshoers.

2. Whether the court of appeals correctly concluded on this record that horseshoers who practice their trade at racetracks where they offer their services generally to such trainers of racehorses as require them, on a fee per horse basis, furnishing their own tools and materials and rendering periodic bills, are independent businessmen, and thus that the trainers and horseshoers do not stand in the relationship of employer and employee.

3. Whether the court of appeals correctly concluded on this record that the dispute between the trainers and the horseshoers does not involve the employer-employee relationship of any other persons either within or without the horseracing or horseshoeing industry, but involves solely the interests of horseshoers who are independent businessmen.

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[1] The petition does not recite the order granting an extension of time and therefore on its face is out of time. However, since there is no question that the order was timely entered and served, respondents raise no issue as to jurisdiction.

STATUTES INVOLVED

The pertinent provisions of the Sherman Antitrust Act, the Clayton Act and the Norris-LaGuardia Act are set forth at pp. 42a-46a of the Appendix to the Petition.

STATEMENT

The essential facts of the case are not in dispute and are well set out in the opinion of the court below (Pet. App. 1a-26a). In brief, this controversy arose out of certain boycotting and price-fixing activities engaged in by petitioners herein, the International Horseshoers Union and its Local No. 7, whose memberships are made up of horseshoers who provide horseshoeing services and materials to trainers and owners of thoroughbred racehorses at racetracks in the United States and Canada. Three of the six respondents are Canadian trainers and the remaining three are American trainers; all of the respondents are engaged in the business of training and racing thoroughbred horses.

The three Canadian respondents had used the services of a horseshoer not a member of the union to shoe their horses in Canada. When they arrived at Bowie, Maryland in the fall of 1962 to race their horses at that track, the horseshoer members of Local No. 7 concertedly refused to shoe any horses for them unless they signed an agreement to use only union members to shoe all of their horses, both in the United States and Canada. This refusal by Local No. 7 to serve the Canadians was required by the International.

The price-fixing activities affect all of the respondents. The members of Local No. 7 charge a minimum fee for shoeing a racehorse; the fee is set by the union and any member who charges less than the established minimum is subject to disciplinary action by the union.

Respondents filed civil actions against the International and Local No. 7 in the district court in Baltimore, seeking relief under the antitrust laws from the boycotting and price-fixing activities of the unions. The relief sought was by way of permanent injunction, declaratory judgment and money damages.

The district court heard the evidence (which is reviewed in detail in the opinion of the court below and will not be restated here) and eventually dismissed the complaints. The court found that the boycotting and price-fixing activities of the petitioners were *per se* violations of the Sherman Act, but concluded that those activities were exempt from the sanctions of the Sherman Act since they involved a labor dispute within the meaning of the Norris-LaGuardia Act. In determining that the cases involved a labor dispute, the court found the necessary employer-employee relationship by concluding as a matter of law that the horseshoers who performed services for the trainers were employees and not independent contractors.

The Court of Appeals for the Fourth Circuit, sitting *en banc*, reversed the district court, finding that the horseshoers were not employees but were independent contractors (Pet. App. 12a-13a); and that the cases did not involve a labor dispute within the meaning of the Norris-LaGuardia Act since the necessary employer-employee relationship is nowhere involved in the dispute, neither between the horseshoers and the trainers nor between any other parties (Pet. App. 22a-23a).

ARGUMENT

The decision below is correct, does not conflict with applicable decisions of this Court or of any other court of appeals, and presents no issue warranting review by this Court.

1. The court below, in deciding that petitioners were not exempt from the antitrust laws, applied a test which petitioners acknowledge (Pet. 5) to be in accordance with settled principles, i.e. that an employer-employee relationship must be the matrix of a controversy in order for there to be a labor dispute which is exempted from the application of the antitrust laws.[2]

However, petitioners contend that the common law standards applied by the court below in reaching the determination that the horseshoers were not employees — and thus that the requisite employer-employee relationship was lacking, are not appropriate standards in view of this Court's decision in *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). Petitioners also contend that the *Columbia River* test that an employer-employee relationship must be the matrix of the controversy is an erroneous one, since it is contrary to Congress' intention to preserve the right of labor to organize to better its conditions through unions and collective bargaining (Pet. 8). The issues raised by petitioners do not merit review by this Court.

2. With respect to the standards to be applied to determine the existence or non-existence of an employer-employee relationship, petitioners rely entirely on this Court's decision in *Hearst* to support their contention that common law standards should not be applied. Such reliance is misplaced. That case did not involve, as does this one, admitted antitrust violations on the part of the persons asserted to be employees. The Court there was concerned simply with reviewing a purportedly expert NLRB determination that certain newsboys were entitled to use the processes of the Act administered by that agency. The

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[2] *Columbia River Packers Association, Inc. v. Hinton*, 315 U.S. 143 (1942).

implementation of the federal policy against restraint of trade was not an issue before the Court.

In any case, the National Labor Relations Act was amended by Congress in 1947 specifically to distinguish between employees and independent contractors and to exclude the latter from its coverage. The legislative history of that amendment clearly shows that it was designed to modify the standards applied by the NLRB and sustained by this Court in the *Hearst* case. Thus the House Report[3] states:

> "An 'employee', according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees'. The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors'. 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to

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[3] H. R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947).

> do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'."

Since the 1947 amendment to the National Labor Relations Act, some courts of appeals, in reviewing NLRB determinations of employee status under that Act, have avowedly continued to follow *Hearst*[4] while others have avowedly rejected it;[5] however, whichever approach the courts of appeals have said they are taking, they have all,[6] consistently and uniformly, applied common law standards,

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[4] See, e.g., *Minnesota Milk Co. v. N.L.R.B.*, 314 F. 2d 761 (8th Cir. 1963).

[5] See, e.g., *Continental Bus System v. N.L.R.B.*, 325 F. 2d 267 (10th Cir. 1963).

[6] *N.L.R.B. v. Nu-Car Carriers*, 189 F. 2d 756 (3d Cir. 1951), cert. denied, 342 U.S. 919 (1952); *N.L.R.B. v. Keystone Floors, Inc.*, 306 F. 2d 560 (3d Cir. 1962); *N.L.R.B. v. A. S. Abell Co*, 327 F. 2d 1 (4th Cir. 1964); *N.L.R.B. v. Steinberg & Co.*, 182 F. 2d 850 (5th Cir. 1950); *N.L.R.B. v. Lindsay Newspapers, Inc.*, 315 F. 2d 709 (5th Cir. 1963); *Deaton Truck Line, Inc. v. N.L.R.B.*, 337 F. 2d 697 (5th Cir. 1964); *N.L.R.B. v. Phoenix Mutual Life Insurance Co.*, 167 F. 2d 983 (7th Cir. 1948), cert. denied, 335 U.S. 845 (1948); *National Van Lines, Inc. v. N.L.R.B.*, 273 F. 2d 402 (7th Cir. 1960); *United Insurance Co. v. N.L.R.B.*, 304 F. 2d 86 (7th Cir. 1962); *Minnesota Milk Co. v. N.L.R.B., supra*, note 4; *Site Oil Co. of Missouri v. N.L.R.B.*, 319 F. 2d 86 (8th Cir. 1963); *N.L.R.B. v. Servette, Inc.*, 313 F. 2d 67 (9th Cir. 1962); *Continental Bus System, Inc. v. N.L.R.B., supra*, note 5.

generally stated in terms of the "right to control" test expounded and emphasized by the court below in reaching its decision in this case. The Court below, therefore, in applying common law standards to distinguish between employees and independent contractors, was breaking no new ground but was following a well-worn furrow.

By their espousal of the *Hearst* case as the proper source for standards, petitioners by implication agree with the decision of the court below that the tests which are appropriate to determine employee or independent contractor status under the National Labor Relations Act are equally appropriate to determine employee or independent contractor status under the Norris-LaGuardia Act. Referring to its earlier decision in *N.L.R.B. v. Abell,* 327 F. 2d 1, the court below said in its opinion in this case: "Although, as we have pointed out, that case arose under the National Labor Relations Act, we perceive no valid reason why the same tests are not applicable here" (Pet. App. 13a).

The court below made an unusually exhaustive study and analysis of both the facts and the law (Pet. App. 4a-14a) in the course of reaching its decision that the horseshoers involved in this case are independent contractors and not employees. The decision that these horseshoers are independent contractors cannot, contrary to petitioners' assertion, affect any other class of persons, typical or atypical. The facts in the case are unique and the horseshoers are *sui generis.* The holding is an extremely narrow one and is not worthy of review by this Court unless the Court is to review the facts and substitute its judgment for that of the courts of appeals in every case wherein the employee or independent contractor status of a so-called atypical employee is involved. Such determinations are properly left to the lower courts and do not merit review by this Court.

3. Nor does petitioners' contention that the *Columbia River* test is erroneous raise an issue warranting review by this Court. Petitioners contend that the application of that test, — that an employer-employee relationship must be the matrix of a controversy in order for it to be a labor dispute and thus render the disputants exempt from the antitrust laws, — under the circumstances of this case, thwarts Congressional intent to give labor broad scope to act collectively in its own interests (Pet. 8, 11, 12). But in truth, the instant case raises no new or important issues with respect to the administration or accommodation of federal antitrust and labor laws. It is true, as petitioners state (Pet. 5), that in earlier years, the accommodation of apparently conflicting federal policies in the areas of restraint of trade and labor-management relations raised difficult questions and resulted in undue restrictions upon working people and their unions by the application of Sherman Act provisions to their activities. However, the passage of the Clayton and Norris-LaGuardia Acts, their eventual interpretation in depth by this Court in *U. S. v. Hutcheson,* 312 U.S. 219 (1941), and cases following, have clearly guaranteed the rights of bona-fide working people to act collectively in their own interest free from the restrictions of the antitrust laws.[7]

This freedom has been held broad enough to include collective activities affecting an employment relationship even when those engaging in them do not stand in the proximate relationship of employees to employer.[8] Despite

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[7] The history of the application of the Sherman Act to union activities and of the subsequent passage and judicial interpretation of the Clayton and Norris-LaGuardia Acts is well summarized by Mr. Justice Black in *Allen Bradley Co. v. Local Union No. 3,* 325 U.S. 797 (1945).

[8] *New Negro Alliance v. Sanitary Grocery Co., Inc.,* 303 U.S. 552 (1938).

petitioners' incorrect assertions to the contrary (Pet. 6, 11), this issue is neither raised nor ruled upon in the instant case. Both the district court (Pet. App. 32a) and the court of appeals (Pet. App. 21a-22a) agreed that a labor dispute would have existed in this case either if the horseshoers were employed by the trainers and disputed some aspect of their relationship, or if the crux of their dispute was the employer-employee relationship of someone else. The whole point of the decision of the court below is that there was no employer-employee relationship of any kind being disputed, neither proximate nor remote, neither a horseshoer's nor anyone else's; and that in such case, under the clear teaching of *Columbia River v. Hinton*, the Norris-LaGuardia Act exemption does not apply.

This Court has recently spoken on the status under the antitrust laws and the Norris-LaGuardia Act of so-called pseudo-unions, made up in whole or in part of independent contractors, in *Los Angeles Meat & Provision Drivers, Local 626 v. U. S.*, 371 U.S. 94 (1962). There, the union had as members both employees who drove trucks for their employer grease processors, and grease peddlers who were independent contractors engaged in buying and selling grease. The situation was analogous to that of the Horseshoers Union in this case, some of whose members work as employees of race tracks or rodeos, others of whom work as independent contractors in selling horseshoes and horseshoing services to trainers and owners, and still others of whom do both. In the *Los Angeles* case, there had been a stipulation in the lower court that the union and the grease peddlers had engaged in restraint of trade, and they had consented to the issuance of a broad injunction against them. The only issue before the Court was the validity of an additional order by the district court

terminating the union membership of the independent grease peddlers.

The Court answered in the negative this question which it posed itself in that case: ". . . whether businessmen who combine in an association which would otherwise be properly subject to dissolution under the antitrust laws can immunize themselves from that sanction by the simple expedient of calling themselves 'Local 626-B' of a labor union" (371 U.S. at 100). In the instant case, despite petitioners' plaintive assertion that the decision below "might have ended the Horseshoers Union, an organization in existence since 1874" (Pet. 9), no such extreme remedy as dissolution of the union or termination of membership of the independent contractor horseshoers has been sought. Despite the decision below, all horseshoers may continue to be members of the union and the union may continue to represent its members who work as employees for race tracks, rodeos or elsewhere, free from antitrust restrictions, as intended by the Norris-LaGuardia Act. The effect of the decision is simply that horseshoers who work as independent contractors providing horseshoeing services and supplies to trainers will not be able to immunize themselves from the sanctions of the antitrust laws by the simple expedient of joining the Horseshoers Union.

The Court of Appeals for the Fourth Circuit correctly applied well established principles in deciding this case, which in no way narrows the freedom of working people to act collectively in their own interest free from antitrust restrictions, but, on the other hand, refrains from extending this freedom beyond the scope of working people to exempt independent businessmen from federal antitrust policies which were intended by Congress to apply to them. The guidelines are clear and have been applied in numerous

cases before this one to deny exemptions[9] to such atypical groups as fishermen,[10] grease peddlers,[11] playwrights,[12] real estate salesmen,[13] smoked fish jobbers[14] and doctors.[15] The application of these established principles by the Court of Appeals for the Fourth Circuit to yet another atypical group — the horseshoers in this case — does not warrant a review by this Court.

4. Contrary to petitioners' contention (Pet. 11), the decision below is not in conflict with *Local 24, International Brotherhood of Teamsters v. Oliver,* 358 U.S. 283 (1959); *Bakery Drivers v. Wohl,* 315 U.S. 769 (1942); *Milk Wagon Drivers Union v. Lake Valley Farm Products,* 311 U.S. 91 (1940); or *Aetna Freight Lines, Inc. v. Clayton,* 228 F. 2d 384 (2nd Cir. 1955), cert. denied 351 U.S. 950.

In each case, petitioners assert (Pet. 11), the holding was "that labor organizations may solicit and act on behalf of self employed entrepreneurs where the dispute affected working conditions in an industry." Since the dispute in the instant case involves "terms and conditions affecting

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[9] In *Mitchell v. Gibbons,* 172 F. 2d 970 (8th Cir. 1949), certain taxicab drivers were held to be entitled to the labor dispute exemption. This decision is not in conflict with the decision of the court below in this case as asserted by petitioners (Pet. 10), but is simply another example of the determination of the issue by a court of appeals on the particular facts applicable to an atypical group in a particular case.

[10] *Columbia River v. Hinton,* 315 U.S. 143 (1942); *Gulf Coast Shrimpers v. U. S.,* 236 F. 2d 658 (5th Cir. 1956); *Hawaiian Tuna Packers, Ltd. v. International Longshoremen's and Warehousemen's Union (CIO),* 72 F. Supp. 562 (D.C. Hawaii 1947).

[11] *Los Angeles Meat & Provision Drivers Union, Local 626 v. U. S.,* 371 U.S. 94 (1962).

[12] *Ring v. Spina,* 148 F. 2d 647 (2d Cir. 1945).

[13] *U. S. v. National Assn. of Real Estate Boards,* 339 U.S. 485 (1950).

[14] *U. S. v. Fish Smokers Trade Council,* 183 F. Supp. 227 (S.D. N.Y. 1960).

[15] *American Medical Assn. v. U. S.,* 317 U.S. 519 (1943).

the entire industry of horseshoeing", petitioners argue that "it is erroneous to require that it immediately affect those who are employees in the industry" (Pet. 12).

The fallacy in petitioners' argument is that in each of the cases cited,[16] while some of the disputants may have been independent contractors, the crux of the dispute involved wages, hours or working conditions of others who were clearly and incontrovertibly *employees;* and the activities in question in each case were designed and intended to affect the economic situation of those *employees;* thus the employer-employee relationship so egregiously lacking in the instant case was present in each case cited and was in each case the matrix of the controversy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[16] *Bakery Drivers v. Wohl,* cited by petitioners, was not decided on the question of whether a labor dispute existed but on the question of whether a New York statute regulating picketing unconstitutionally restricted freedom of speech.